



## Environmental Crimes Section Environment & Natural Resources Division Monitor Selection Process

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In all Environmental Crimes Section (ECS) cases imposing a monitor as part of a corporate resolution, the following selection process should be followed. While this memo discusses the selection process, the decision whether a monitor is warranted and appropriate is discussed at length in Justice Manual 9-28.1700.<sup>1</sup>

### Required Conditions for Monitorships in ECS Cases

ECS attorneys should ensure that the following conditions are met for any monitorship:

*First*, monitorships in environmental crimes cases must be incorporated as a condition of probation in a plea agreement or in the court's judgment of conviction, and not as a condition in a side agreement between the government and the defendant.

*Second*, the reasons for requiring a monitorship should be set forth in the government's sentencing memorandum.

*Third*, the plea agreement or judgment of conviction should clearly and specifically enumerate the responsibilities, duties, and obligations of the monitor, as well as the minimum qualifications and desired areas of expertise necessary to ensure selection of a monitor capable of carrying out these responsibilities, duties, and obligations. This applies even if a monitor has been selected prior to sentencing, in order to inform the selection of a replacement monitor if necessary.

*Fourth*, to allow for continued review, the plea agreement or judgment of conviction should provide for reporting at regular intervals by the monitor to the court and the government about the status of the monitorship, the work performed by the monitor, and

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<sup>1</sup> See Memoranda of Deputy Attorney General Lisa O. Monaco, "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies," Oct. 28, 2021, and "Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group," Sept. 15, 2022. These guidance documents build upon a series that began with Memorandum from Acting Deputy Attorney General Craig S. Morford, "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations," Mar. 7, 2008 (applicable to deferred and non-prosecution agreements); Memorandum from Acting Deputy Attorney General Gary C. Grindler, "Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations," May 25, 2010 (applicable to deferred and non-prosecution agreements); and Memorandum of Assistant Attorney General Brian A. Benczkowski, "Selection of Monitors in Criminal Division Matters," Oct. 11, 2018 (Part A entitled "Principles for Determining Whether a Monitor is Needed in Individual Cases," as superseded by Oct. 28, 2021, Monaco Memo, applicable to entire Department; remainder applicable to Criminal Division only).

the performance of the defendant. The agreement should direct the monitor to promptly notify the court and the government if they are being denied access to information, resources, or corporate employees or agents necessary to fulfill their responsibilities.

*Fifth*, the plea agreement or judgment of conviction should prohibit the monitor from seeking, offering, accepting, or discussing additional work for the defendant during the period of probation and for at least two years thereafter.

All plea agreements and sentencing recommendations imposing a corporate monitor must be reviewed and approved by both the Assistant Section Chief supervising the case and/or the Section Chief or Deputy Section Chief. Notice of the imposition of a monitor must be given to the Assistant Attorney General (AAG) in charge of the Environment and Natural Resources Division.

In the case of a deferred or non-prosecution agreement,<sup>2</sup> the information required to be set forth in documents described in the Second through Fifth conditions, above, must be set forth in the written agreement between the government and the corporate entity. Unlike court-appointed monitors, the selection of an independent compliance monitor in a deferred or non-prosecution agreement must be approved by the Office of the Deputy Attorney General. Thereafter, ECS must provide a copy of the agreement imposing the monitor to the Assistant Attorney General (AAG) for the Environment and Natural Resources Division, who will in turn provide the agreement to the AAG for the Criminal Division at a reasonable time after it has been executed.

### **Selection Process**

Consideration of monitor candidates shall be conducted by a committee comprised of the lead trial attorney, the ECS Deputy Chief, and the Section's professional responsibility officer. There shall be a written memorandum to the file confirming that neither the committee members nor the monitor selected have any conflicts. The selection process shall be conducted in keeping with the Department's commitment to diversity, equity, inclusion and accessibility. This includes with respect to the monitor, as well as the team supporting the monitor. The preferred method of monitor selection includes the following steps:

*First, nomination of at least three candidates.*

If the court is selecting the monitor, the defendant must nominate at least three candidates over which the government has veto authority. All candidates must be subject to U.S. jurisdiction for purposes of compelling documents or appearances. The defendant must provide a written certification that it will not employ or be affiliated with the selected monitor, the monitor's firm, or other professionals who are part of the monitorship team during the term of the monitorship, for a period of not less than two years from the date of the termination of the monitorship. The defendant may identify the candidate that is its first choice to serve as the monitor.

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<sup>2</sup> Because of the civil and regulatory enforcement alternatives for environmental offenses, ECS disfavors and rarely enters into corporate deferred prosecution and non-prosecution agreements.

ECS attorneys shall veto or object to any candidate with a conflict of interest or whose past, present, planned, or under-consideration business, financial, or close personal relationships with the defendant or the government create an appearance of favoritism or bias. ECS attorneys shall also veto or object to any candidate determined to have insufficient experience, expertise, or resources to discharge the responsibilities, duties, and obligations of the monitor. The defendant must replace any government-vetoed candidate with a new candidate within a specified amount of time.

If the government is selecting the monitor, the defendant must nominate at least three candidates. If any of the three nominees is found to have a conflict of interest or a relationship to the parties that creates the appearance of favoritism or bias, the government must reject that candidate and may ask the defendant to nominate a replacement candidate.

*Second, submission by candidates of written materials that include or address the following:*

- 1) A description of each candidate's qualifications and credentials in support of the proposed monitorship;
- 2) A brief description of the other members of the candidate's proposed team, if any, and the roles any team members will play in the monitorship;
- 3) The candidate's (and candidate's team's) ability to access and deploy resources needed to discharge duties as the monitor, including subject matter, compliance, and linguistic expertise;
- 4) A description of any past, present, planned, or under-consideration business, financial, or close personal relationship that the candidate, the candidate's firm, and the candidate's team members had or has with the defendant (including all subsidiaries and affiliates) or the United States (except salary, if previously employed by the government);
- 5) Verification or certification that the candidate, the candidate's firm, and/or the candidate's team members (if any) have no conflicts of interest with regard to this matter or that any conflict has been waived (and in the context of a waiver, further detailed description of the conflict and the waiver);
- 6) Verification or certification that the candidate, the candidate's firm, and the candidate's team members agree not to engage in any other business (including receiving any form of compensation) with the defendant for a minimum of two years after the conclusion of the term of the monitorship;
- 7) A description of relevant experience or expertise of the candidate and his or her team in the following areas, as appropriate:
  - a. the defendant's industry;
  - b. environmental law and regulations, particularly those related to the relevant statutes at issue;
  - c. other relevant statutes (e.g., anti-fraud) under federal, state, tribal, or foreign law;
  - d. designing, implementing, overseeing, and reviewing corporate ethics and compliance programs;

- e. experience serving as a monitor or advising a company in responding to a monitor;
  - f. experience with corporate governance of corporations similar to defendant in size and structure;
  - g. information technology, including forensic analysis of electronic information;
  - h. any other relevant specialized technical knowledge; and
  - i. any necessary foreign language; and
- 8) An overview of the candidate's plan, personnel, and budget for the monitorship.

*Third, candidate interviews.*

If the government is selecting the monitor, the committee must conduct interviews of the candidates (and any support personnel and/or team members, where applicable) to inform its decision. The feedback from the interviews should be discussed with the Assistant Chief supervising the case prior to any selection. If the court is selecting the monitor, the ECS attorney should recommend that the court conduct interviews of the candidates.

*Fourth, selection of monitor.*

If the government is selecting the monitor, the selection must be from the final group of three or more nominees. If the government selects the monitor prior to the entry and acceptance of a plea agreement, the name of the monitor selected must be included in the plea agreement. If the government will be selecting a monitor after the court's acceptance of a plea agreement, the plea agreement must include deadlines for the defendant's nomination of candidates and the government's selection of a candidate, along with a procedure for notifying the court of the government's selection. All monitor selections are subject to approval by the court.

This memorandum provides only internal ECS guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.